



U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



FILE: [REDACTED] Office: Honolulu

Date: AUG 14 2000

IN RE: Applicant: [REDACTED]

APPLICATION: Application for Waiver of the Foreign Residence Requirement
under § 212(e) of the Immigration and Nationality Act, 8 U.S.C.
1182(e)

IN BEHALF OF APPLICANT:



Public Copy

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Terrence M. O'Reilly, Director
Administrative Appeals Office

DISCUSSION: The application was denied by the District Director, Honolulu, Hawaii, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Denmark who is subject to the two-year foreign residence requirement of § 212(e) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1182(e), because she participated in an exchange program which was financed by a government agency. The applicant was admitted to the United States as a nonimmigrant visitor on May 12, 1995. She was granted a change of nonimmigrant status to that of exchange visitor on October 6, 1995. The applicant married a United States citizen on October 2, 1995. The applicant is now seeking the above waiver after alleging on the application that her departure from the United States would impose exceptional hardship on her U.S. citizen spouse and three stepsons, now ages 19, 18 and 15 years 11 months.

The director determined that the record failed to establish that the applicant's departure from the United States would impose exceptional hardship upon the qualifying relatives and denied the application accordingly.

The record contains evidence that the applicant sought a waiver of the two-year foreign residence requirement from the United States Information Agency (USIA) based on a "No Objection" statement from her government. The USIA determined on January 13, 1997 that the waiver should be denied. Such a decision by the USIA does not prevent the applicant from seeking a waiver of the two-year foreign residence requirement based on exceptional hardship to a qualifying relative.

On appeal, counsel for the applicant states that the Service failed to consider all of the hardship factors presented and cited Matter of O-J-O-, Interim Decision 3280 (BIA 1996), in support of that statement.

Matter of O-J-O- dealt with a matter involving the former suspension of deportation and now referred to as cancellation of removal. In former suspension of deportation proceedings under § 244 of the Act, 8 U.S.C. 1254, an alien could show extreme hardship to himself/herself as well as such hardship to a qualifying relative. In the present cancellation of removal proceedings under § 240A of the Act, 8 U.S.C. 1229b, hardship to the alien is not a consideration for nonpermanent residents.

In Matter of Marin, 16 I&N Dec. 581 (BIA 1978), the Board stated that, for the most part, it is prudent to avoid cross application, as between different types of relief, of particular principles or standards for the exercise of discretion. See also Matter of Mendez-Morales, Interim Decision 3272 (BIA 1996). In those matters, the alien was seeking relief from removal (deportation). In the matter at hand, the alien is seeking relief from inadmissibility (exclusion) for being subject to the two-year foreign residence requirement.

Counsel asserts that the Service failed to follow established precedent decisions and cited Matter of Nassiri, 12 I&N Dec. 756 (Dep. Assoc. Comm. 1968). In that decision the alien, a physician from Iran and sole source of family income, was granted a waiver because it was concluded that the alien had a U.S. citizen or permanent resident spouse and children and he would command a lower salary if the qualifying relatives accompanied him to Iran and the relatives would experience hardship in parting from their friends and in attempting to adjust to life in a foreign country where they are not familiar with the language, mores or customs. The applicant in the present matter is not the sole source of family income. Although the present marriage has had a positive impact on the applicant's stepchildren, her spouse was supporting himself and his four children of 2 prior marriages for several years before he married the applicant. Further, the applicant's spouse and three children do not have to accompany the applicant abroad and part from their friends and reside where the language, mores and customs are different..

Section 212(e) EDUCATIONAL VISITOR STATUS: FOREIGN RESIDENCE REQUIREMENT; WAIVER.-No person admitted under § 101(a)(15)(J) of the Act or acquiring such status after admission-

(i) whose participation in a program for which he came to the United States was financed in whole or in part, directly or indirectly, by an agency of the Government of the United States or by the government of the country of his nationality or his residence....,

shall be eligible to apply for an immigrant visa or for permanent residence, or for a nonimmigrant visa under §§ 101(a)(15)(H) or 101(a)(15)(L) until it is established that such person has resided and been physically present in the country of his nationality or last residence for an aggregate of at least two years following departure from the United States: Provided, That upon the favorable recommendation of the Director, pursuant to the request of an interested United States Government agency (or, in the case of an alien described in clause (iii), pursuant to the request of a State department of Public Health, or its equivalent), or of the Commissioner of Immigration and Naturalization after he has determined that departure from the United States would impose exceptional hardship upon the alien's spouse or child (if such spouse or child is a citizen of the United States or a lawfully resident alien), or that the alien cannot return to the country of his nationality or last residence because he would be subject to persecution on account of race, religion, or political opinion, the Attorney General may waive the requirement of such two-year foreign residence abroad in the case of any alien whose admission to the United States is found by the Attorney General to be in the public interest except that in the case of a waiver requested by a State Department of Public Health, or its equivalent, or in the case of a waiver requested by an

interested United States government agency on behalf of an alien described in clause (iii), the waiver shall be subject to the requirements of § 214(k): And provided further, That, except in the case of an alien described in clause (iii), the Attorney General may, upon the favorable recommendation of the Director, waive such two-year foreign residence requirement in any case in which the foreign country of the alien's nationality or last residence has furnished the Director a statement in writing that it has no objection to such waiver in the case of such alien.

Matter of Mansour, 11 I&N Dec. 306 (D.D. 1965), held that even though it is established that the requisite hardship would occur abroad, it must also be shown that the spouse would suffer as the result of having to remain in the United States. Temporary separation, even though abnormal, is a problem many families face in life and does not represent exceptional hardship as contemplated by § 212(e) of the Act. See Matter of Bridges, 11 I&N Dec. 506 (D.D. 1965).

Adjudication of a given application for a waiver of the foreign residence requirement is divided into two segments. Consideration must be given to the effects of the requirement if the qualifying spouse and/or child were to accompany the applicant abroad for the stipulated two-year term. Consideration must separately be given to the effects of the requirement should the party or parties choose to remain in the United States while the applicant is abroad.

An applicant must establish that exceptional hardship would be imposed on a citizen or lawful permanent resident spouse or child by the foreign residence requirement in both circumstances and not merely in one or the other. Hardship to the applicant is not a consideration in this matter.

In Keh Tong Chen v. Attorney General, 546 F. Supp. 1060 (D.D.C. 1982), the court addressed the issue of the waiver of the two-year foreign residence requirement. In a discussion of the term "exceptional hardship," the court specifically referred to the standards established in H.R. Rep. No. 721, 87th Cong., 1st Sess. 121 (1961), as follows:

Courts deciding § 212(e) cases have consistently emphasized the Congressional determination that it is "detrimental to the purposes of the program and to the national interests of the countries concerned to apply a lenient policy in the adjudication of waivers including cases where marriage occurring in the United States, or the birth of a child or children, is used to support the contention that the exchange alien's departure from this country would cause personal hardship."...Courts have effectuated Congressional intent by declining to find exceptional hardship unless the degree of hardship expected was greater than anxiety, loneliness, and altered financial circumstances ordinarily anticipated

from a two-year sojourn abroad. See Mendez v. Major, 340 F.2d 128, 132 (8th Cir. 1965); Talavera v. Pederson, 334 F.2d 52, 58 (6th Cir. 1964).

The court noted additionally that the significance traditionally accorded the family in American life warrants that where the applicant alleges that denial of a waiver will result in separation from both a citizen-spouse and a citizen-child, a finding of "no exceptional hardship" should not be affirmed unless the reasons for this finding are made clear. The court's insistence upon clear articulation of reasons in cases involving a citizen-spouse and a citizen-child is consistent also with Congressional policy.

The applicant states that they could not afford two households if her husband and stepchildren remain in the United States while she returns temporarily to Denmark. The record is devoid of any information regarding the possibility of the applicant residing temporarily with her parents or siblings if she chose to return to Denmark alone.

Counsel states that the applicant's admission would be in the public interest.

Section 212(e) of the Act provides the following four grounds for waiving the two-year foreign residence requirement.

- (1) a request from an interested U.S. government agency;
- (2) the likelihood of persecution if the alien returns to his or her home country;
- (3) exceptional hardship to the alien's spouse or child (if such spouse or child is a citizen of the United States or a lawfully resident alien); or
- (4) a "no objection" letter from the alien's home country, except for aliens described in clause (iii) who came to the United States to receive graduate medical education or training.

As a basis for granting a waiver on any of the first three grounds, the statute specifies that the Attorney General must find that granting the waiver would be "in the public interest." Only the fourth ground (no objection from the alien's home country) permits a waiver without a finding of public interest.

The record is devoid of specific documentation which would reflect that the qualifying relatives would suffer any type of hardship, other than the hardship of separation anticipated here, if the applicant's spouse and stepchildren chose to remain in the United States. Such hardship is the usual hardship which might be anticipated during a temporary separation between family members caused by military, business, educational, or other obligations. While certainly inconvenient, such hardship does not rise to the level of "exceptional" as contemplated by Congress.

In this proceeding, it is the applicant alone who bears the full burden of proving his or her eligibility. Matter of T--S--Y--, 7 I&N Dec. 582 (BIA 1957); Matter of Y--, 7 I&N Dec. 697 (BIA 1958). In this case, the burden of proof has not been met, and the appeal will be dismissed.

ORDER: The appeal is dismissed.